UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RENEE S. MAJORS, Plaintiff,	)	
v.	)	CASE NO. 1:10-cv-1731 LJM-MJD
GENERAL ELECTRIC COMPANY, Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, General Electric Company ("GE" or "Company"), submits this Brief in Support of its Motion for Summary Judgment.

I. INTRODUCTION

On December 29, 2010, plaintiff, Renee Majors ("Plaintiff" or "Majors"), filed suit under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. ("ADA"), alleging that GE regarded her as disabled, and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"), alleging sex discrimination and retaliation. Majors claims that GE denied her a temporary Purchased Material Auditor ("PMA") position in May 2009 and a permanent PMA position in October 2009 because of her sex and perceived disability. Majors also alleges that after she filed a charge with the Equal Employment Opportunity Commission ("EEOC") in 2005, GE retaliated against her by denying her the opportunity to work overtime or on Fridays when the plant was off for lack of work ("LOW").

GE is entitled to summary judgment on all of Majors' claims. Majors cannot establish a *prima facie* case of sex discrimination in promotion because she was not qualified and able to perform the PMA job; lifting in excess of 20 pounds is an essential function of the PMA job and Majors had permanent restrictions precluding her from lifting over 20 pounds. Moreover, Majors cannot prove that GE's legitimate, non-discriminatory reason for denying her the PMA jobs—her permanent work restrictions—constitutes pretext for sex discrimination. Indeed, all of the individuals who investigated whether Majors could perform the PMA job, and determined she could not, are women.

Majors' ADA claim over the PMA jobs fares no better than her Title VII claim. First, Majors specifically disclaims having an actual disability; she alleges only that GE regarded her as disabled. Accordingly, GE had no duty to provide Majors with a reasonable accommodation. Second, the undisputed facts, including Majors' own testimony, establish that lifting in excess of 20 pounds is an essential function of the PMA job and that Majors' permanent work restrictions precluded her from lifting over 20 pounds. Third, although Majors was not entitled to a reasonable accommodation under the ADA, GE conducted an extensive analysis of the PMA job, determined that Majors could not perform its essential functions, and found no reasonable accommodations existed that would allow Majors to do so. Majors' only suggested "accommodations"—having someone else perform the lifting for her or disregarding her permanent restrictions—are unreasonable as a matter of law.

GE is entitled to summary judgment on Majors' retaliation claims for multiple procedural and substantive reasons. Procedurally, they are time-barred as to any conduct occurring prior to June 3, 2009. In addition, Majors' Friday work claim is outside the scope of the charges of discrimination she filed with the EEOC and, therefore, not properly before the Court. On the merits, Majors' supervisors responsible for assigning overtime and Friday work had no knowledge that she filed EEOC charges. Consequently, they could not have retaliated against her for filing a charge. Even if her supervisors had been aware of her EEOC charges, Majors could not establish a *prima facie* case of retaliation because she cannot show that similarly situated employees who did not file charges were treated better. Finally, Majors cannot show that GE's legitimate, non-discriminatory reasons for not asking her to work overtime or on Fridays when the plant was off for LOW constitute pretexts for retaliation.

Accordingly, the Court should enter summary judgment in favor of GE on all of Majors' claims.

II. STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

A. GE's Bloomington, Indiana Plant

GE manufactures side-by-side refrigerators at its Bloomington, Indiana plant. Over 3,000 employees worked in the plant in 2000. (Majors Dep., p. 20) By 2009, the number of employees was down to around 750-800, and today only about 600 employees work at the plant. (Jones Dep., pp. 17-18) On January 17, 2008, GE announced that it planned to close the Bloomington plant. (Majors Dep. pp. 209-10; Ex. 28) Fortunately, in 2009, GE decided to keep the plant open. Business, however, continues to be challenging. During 2009, the Bloomington plant experienced numerous LOW days—days when no production was scheduled and few employees worked. (Jones Dep., pp. 46-51; Ex. C; Majors Dep. pp. 210-11) On a LOW day, hourly employees know they will not work unless they are brought in for a particular reason, *i.e.*, preventative maintenance or rework. (*Id.*)

1. Collective Bargaining Agreement between GE and the IBEW

Hourly employees at GE's Bloomington plant are members of a bargaining unit represented by the International Brotherhood of Electrical Workers, Local 2249 ("IBEW" or "Union"). (Majors Dep., p. 65; Ex. 8) Consequently, the terms and conditions of their employment are governed by a collective bargaining agreement ("CBA") between GE and the IBEW.[1] (Majors Dep., pp. 65-67; Ex. 8)

a. Job awards process

Under the CBA, jobs are awarded to the most senior eligible bidder. (Karr Dep., p. 12) When job awards are posted, they simultaneously are forwarded to the onsite medical clinic, which is operated by a third party, Concentra. (Karr Dep., p. 13; Kristoff Dep., pp. 6-7) Clinic personnel review the job awards and the employees' medical files to see if there are any restrictions that may need to be addressed. (Kristoff Dep., pp. 19-20) GE seeks to accommodate employees, whether or not they are disabled within the meaning of the ADA. (Karr Dep., pp. 27, 40-41; Kristoff Dep., pp. 19-20; Lewellen Dep., pp. 5-8) Clinic personnel work with GE personnel to try to accommodate employees in positions. (Karr Dep., pp. 40-41; Kristoff Dep., pp. 19-20; Lewellen Dep., pp. 6-8) Lead Occupational Health Nurse Toni Kristoff testified regarding the procedures she follows in conducting a job placement review:

> I go to the [employee's] chart, pull the medical classification. Look at the job that I assume that they are to do. I look at the essential functions of the job. If there's . . . Talk to the BTL [(Business Team Leader-Supervisor)] and talk to the placement . . . at the time of Renee's [Majors'] the placement specialist [(Linda Schneider)], see if there's any issues or not a match. If there is, I can go out and look at the job. If I'm not familiar with it, I talk to the BTL and see if there's been any changes. I try to talk to the employee that does the job to see if there's anything that isn't covered that would create a problem. And, I talk to the Ergonomics Specialist [(Ruth Lewellen)] to see if there's anyway we can make a fit for the job.

(Kristoff Dep., pp. 6, 19-20) Thereafter, Kristoff sends "[a]n e-mail usually to the HR person to let them know if the person is qualified or not medically." (Kristoff Dep., p. 20)

Majors admitted that GE "takes good care of the employees who have disabilities"; that GE "made accommodations for everybody in jobs. They've even physically made up jobs that didn't even exist for people that have restrictions in that plant." (Majors Dep., p. 185) Majors elaborated that "for years and years and years, it's like anytime anybody had a restriction, like I said, the Clinic and the Ergonomics made accommodations for those people so—if there was anyway possible, so they could get those jobs." (Majors Dep., p. 182)

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[1] GE, the International IBEW, and other unions are party to a national CBA that governs certain terms and conditions of employment at numerous plants around the United States, including the Bloomington plant.

b. Overtime

Under the CBA, overtime is equalized "among the employees within a job classification on the same shift in the cost center."[2] (Majors Dep., pp. 66-67; Ex. 8, p. 18; Ex. 31) Supervisors, known as Business Team Leaders (or BTLs), determine what overtime is needed, including the job classifications/employees needed. (Jones Dep., p. 25)

B. Majors' Work History With GE

GE hired Majors on April 25, 1972. (Complaint, ¶ 10) In September 2000, Majors suffered a work-related injury to her right shoulder. She initially had temporary work restrictions. (Majors Dep., p. 45; Ex. 4) By the spring of 2001, Majors received permanent work restrictions of no lifting over 20 pounds and no work with her right arm above eye-level fully extended. (Majors Dep., Exs. 5-7; Kristoff Dep., p. 22; Exs. I, J)

Majors worked as a Quality Control Inspector ("QCI") in Assembly from February 2003 until her voluntary retirement in October 2009. (Complaint, ¶ 12; Majors Dep., p. 24) As a QCI in Final Assembly throughout 2008 and 2009, Majors' job classification was 9014 and she was assigned to Cost Center C86. (Majors Dep., p. 29; Ex. 1) Gary Hamilton became Majors' BTL in January 2009. Amine Karoud was Majors' BTL from February to July 2009, at which point Hamilton again supervised Majors until she retired at the end of October 2009. (Jones Dep., pp. 25, 27; Ex. B, p. 4; Majors Dep., pp. 31-32)

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[2] GE has many cost centers at the Bloomington plant. Cost centers consist of groups of employees with similar work. (Jones Dep., p. 18) The CBA defines a cost center as a "[d]esignated area and its employees as determined by financial accounting department." (Majors Dep. Ex. 8, p. 139)

1. *May 2009 temporary PMA position*

On May 1, 2009, GE posted a temporary PMA position because PMA Stephen Howe ("Howe") was going on an extended leave of absence. (Karr Dep., p. 11) The PMA inspects, performs tests on, and/or audits a variety of purchased components to determine conformance to engineering specifications and acceptability of quality standards. (Majors Dep., Ex. 2) The PMA job description notes the job requires the "intermittent movement of heavy objects." *Id.* In her deposition, Majors testified that the job description is accurate, and that lifting parts and materials weighing in excess of 20 pounds is essential. (Majors Dep., pp. 36, 179)

Majors bid on the PMA position and, as the senior eligible bidder, was awarded the position on May 5, 2009. (Majors Dep., Ex. 14; Karr Dep., pp. 12-13) Simultaneously, the award was forwarded to the medical clinic to determine if Majors had any work restrictions that might impact her ability to perform the PMA job. (Karr Dep., pp. 13-14; Kristoff Dep., pp. 19-20) Clinic nurse Kristoff followed each of the steps she outlined above to determine whether Majors was medically qualified for the PMA position. (Kristoff Dep., p. 20) Kristoff noted the permanent work restrictions in Majors' file and reviewed the job description for the PMA job, which notes the "intermittent movement of heavy objects" as an essential function. (Kristoff Dep., pp. 19-20) Kristoff then followed up with GE's Labor Resources Manager, Linda Schneider ("Schneider"), regarding the job's lifting requirements. (Kristoff Dep., pp. 19-20, 27-28) Upon finding that lifting in excess of 20 pounds was an essential job function, Kristoff responded on May 6, 2011 that Majors was not medically recommended for the PMA job. (Kristoff Dep., p. 28) Majors was informed that she would not be awarded the temporary PMA position.

After Majors expressed her belief that she could perform the PMA job, GE conducted a further review and job analysis. (Kristoff Dep., p. 27; Majors Dep. Ex. 25) Kristoff, Schneider, and Ruth Lewellen ("Lewellen"), an ergonomic technical specialist (an hourly bargaining unit employee), reviewed the job description. (Lewellen Dep., pp. 6-7; Kristoff Dep., pp. 19-20, 26) They then visited the work area to investigate the essential functions of the PMA position. (Lewellen Dep., pp. 6-8; Kristoff Dep., p. 21) Additionally, they spoke with a PMA, Bob East ("East"), and spoke with the manager of the PMAs, Tom Jenkins ("Jenkins"). (Lewellen Dep., p. 9; Kristoff Dep., pp. 19-20, 27-29; East Dep., pp. 17-18) East and Jenkins confirmed that lifting of parts and material weighing over 20 pounds, *i.e.*, compressors and boxes of screws and door handles, was an essential part of the PMA's job. (Lewellen Dep., pp. 6-9; Kristoff Dep., pp. 27-28; Majors Dep. Ex. 25) Schneider and Lewellen also weighed objects Majors would be required to lift, including compressors and boxes of screws, which well-exceeded 20 pounds. (Lewellen Dep., pp. 8-9; Kristoff Dep., p. 21) Kristoff and Lewellen also spoke to Majors, and Majors suggested that a stock handler perform the required lifting. (Lewellen Dep., pp. 10-11; Kristoff Dep., p. 29, 51) The nurse practitioner, Sharon Crane, also reviewed this matter and agreed with Kristoff that Majors could not perform the essential functions. (Kristoff Dep. pp. 43-44) Upon review of all of the information, GE determined that Majors could not perform the essential functions due to her permanent work restrictions. (Karr Dep., pp. 13-14; Kristoff Dep., pp. 27-29, 38, 41, 43-44, 51-52) As a result, the temporary PMA job was awarded to Barry Taylor ("Taylor"), the next most senior eligible bidder. (Karr Dep., p. 15)

Majors filed a grievance under the CBA regarding the denial of the PMA jobs. (Majors Dep., Ex. 16) GE denied the grievance and the Union did not pursue the matter to arbitration. (Majors Dep., p. 154)

2. Voluntary special early retirement option

In the 2007-2011 national CBA, GE and the unions negotiated a voluntary Special Early Retirement Option ("SERO") Window. (Majors Dep., pp. 180-81) The SERO Window was available to employees across the United States who had at least 25 years of service and were age 55 or over. (Jones Dep., pp. 42-43; Myers Dep., pp. 9-10) As Human Resource Manager Joe Jones testified, the SERO Window "allows people to retire early and draw really good benefits." (Jones Dep., p. 43) Employees interested in the SERO Window had to apply by August 31, 2009, and they had the option to retire on October 1, 2009 or November 1, 2009. (Majors Dep., pp. 188-90; Ex. 24; Myers Dep., p. 10) On August 24, 2009, Majors submitted her application for the SERO Window with a November 1, 2009 retirement date. (Majors Dep., pp. 188-90; Ex. 24) Majors completed the remaining paperwork for the SERO in late October 2009. By electing to retire through the SERO Window, Majors not only was able to retire early with health insurance, but she received an additional $1,056.00 per month in pension benefits until she reached age 63 (for six years). (Myers Dep., pp. 13-14; Ex. E)

3. October 2009 permanent PMA position

In October 2009, GE posted the PMA job as a permanent position because Howe retired. (Karr Dep., p. 11) Although she had already submitted her application for the SERO and her QCI job had been posted for bidding, Majors bid on the PMA job. (Karr Dep., pp. 6-7) She again was the senior eligible bidder and, as a result, was initially awarded the job. (Karr Dep., p. 14) The job award was posted and forwarded to the clinic. (Karr Dep., pp. 13-14) Kristoff reviewed Majors' file, saw that the permanent restrictions remained in place, and followed up, in conjunction with Lewellen, to confirm whether there had been any changes in the PMA job that would result in any different assessment than five months earlier in May 2009. (Kristoff Dep., pp. 19-20; Ex. H) Ken Kolbe ("Kolbe"), the supervisor over the PMAs at the time, confirmed the job had not changed, and lifting over 20 pounds remained an essential job function. (Kristoff Dep., pp. 19-20, 27-29; Ex. H; Kolbe Dep., pp. 20, 25-26; Ex. D) Accordingly, Majors was denied the PMA job and it was awarded to the next most senior eligible bidder, Rodney Ira. (Karr Dep., pp. 14-15; Kristoff Dep. Ex. H)

Majors filed a grievance over being denied the permanent PMA job. (Majors Dep., p. 206; Ex. 27) GE denied the grievance, and the Union did not pursue it to arbitration. (Majors Dep., pp. 206, 209)

C. Majors' EEOC Charges

1. May 22, 2009 charge

On May 22, 2009, Majors filed a charge of discrimination with the EEOC. (Complaint, Ex. A) Majors alleged she was denied the temporary PMA job because of her sex and disability. Majors did not identify any other alleged discriminatory act, and she listed May 7, 2009 as the earliest date of alleged discrimination. (Complaint, Ex. A)

2. March 30, 2010 charge

On March 30, 2010, Majors filed another charge of discrimination with the EEOC. (Complaint, Ex. C) Majors alleged she was denied the permanent PMA job because of her sex and disability/perceived disability. Majors also alleged retaliation—Majors claimed: "In 2005, I filed a charge of discrimination due to my disability. Once I filed the charge I have been continuously denied overtime." (Complaint, Ex. C)

III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Importantly, Rule 56(c) does not require that the moving party negate its opponent's claim. *Celotex*, 477 U.S. at 323, 325. Rather, Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex*, 577 U.S. at 322.

The non-moving party "may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth v. Quotesmith.com. Inc.*, 476 F.3d 487, 490 (7th Cir. 2007). A "genuine" issue does not exist unless sufficient record evidence would permit a reasonable jury – that is a jury that will base its decision on the facts and the law, rather than on sympathy or antipathy or private notions of justice – to return a verdict for the non-movant on the evidence presented. *Anderson*, 477 U.S. at 247-48; *Karazanos v. Navistar Int'l Trans. Corp.*, 948 F.2d 332, 338 (7th Cir. 1991). A scintilla of evidence in support of a non-movant's position or evidence that is "merely colorable" does not preclude summary judgment; rather, there must be "significantly probative" evidence. *Anderson*, 477 U.S. at 249, 252. Moreover, the non-moving party must show that the disputed facts are "material." *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* In other words, a court may grant summary judgment "not only when the material facts are undisputed, but also when the non-movant's evidentiary offering is simply too thin to warrant the case going to trial." *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 285 (N.D. Ill. 1988).

IV. ARGUMENT

A. GE Is Entitled To Summary Judgment On Majors' Sex Discrimination Claim.

Majors, a female, claims that a female Labor Resources Manager (Schneider), a female Human Resources Administrator (Karr), and a female Ergonomic Technical Specialist

(Lewellen), upon recommendation from a female nurse (Kristoff), denied her the temporary and permanent PMA positions because she is a female. (Majors Dep. p. 297) "[A] little common sense is not amiss in a discrimination case." *Wallace II v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997). Majors' contentions are baseless, and GE is entitled to summary judgment.

Under Title VII, a plaintiff may prove disparate treatment based on her sex under either the direct or indirect method of proof. *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498, 504 (7th Cir. 2004). Where, as here, the plaintiff has no evidence supporting the direct method, she may proceed under the indirect, burden-shifting method articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

1. Majors cannot establish a prima facie case of sex discrimination

To establish a *prima facie* case in a failure to promote context, Majors must show that: (1) she belongs to a protected class; (2) she applied for and was qualified for the PMA job; (3) she was rejected for the job; and (4) the job was awarded to someone outside the protected group who was not better qualified than plaintiff. *Grayson v. City of Chicago*, 317 F.3d 745, 748 (7th Cir. 2003), *citing Johnson v. Nordstrom, Inc.*, 260 F.3d 727, 732 (7th Cir. 2001), *cert. denied* 535 U.S. 928 (2002).

a. Majors was not qualified for the PMA jobs because she could not perform the essential function of lifting objects weighing over 20 pounds.

The PMA job description expressly provides that the job requires the "intermittent movement of heavy objects." (Majors Dep., Ex. 2) Majors *admits* that lifting objects weighing over 20 pounds is an essential function of the PMA job. (Majors Dep., pp. 36, 179) Similarly, the supervisor of the PMAs confirmed that lifting objects weighing over 20 pounds is an essential function of the job. (Kolbe Dep., pp. 11-12, 20, 26) What is more, when GE analyzed the PMA job to determine whether Majors could perform it, Schneider and Lewellen personally weighed several items that PMAs must lift, *i.e.*, compressors, boxes of screws, and determined they weighed over 20 pounds. (Lewellen Dep., pp. 8-9) And, Majors had permanent medical restrictions that precluded her from lifting objects weighing over 20 pounds. (Majors Dep., Exs. 5-7; Kristoff Dep., pp. 27-28; Exs. I, J) Accordingly, Majors was not qualified for the PMA job and cannot establish a *prima facie* case of sex discrimination.

b. Through the CBA's sex-neutral job awards policy, the PMA jobs were awarded to bidders who were better qualified than Majors.

The bidders who received the PMA jobs, Taylor and Ira, did not have restrictions that precluded them from performing the essential functions of the PMA job. Hence, both Taylor and Ira were qualified to perform the essential functions of the PMA jobs, while Majors was not. Moreover, pursuant to the job awards process contained in the CBA, Taylor and Ira were the next senior eligible bidders, after GE determined that Majors' permanent restrictions precluded her from performing the PMA jobs. *See generally Hamillton v. Komatsu Dresser Industries, Inc.*, 964 F.2d 600 (7th Cir. 1992), *cert. denied* 506 U.S. 9616 (1992) (holding that plaintiffs were not promoted and laid off because of their age; rather, those adverse actions resulted from a neutral seniority system contained in a collective bargaining agreement). GE awarded the PMA jobs to Taylor and Ira because they were the most senior eligible bidders who were qualified to perform the jobs, not because they were men.

2. Majors cannot prove pretext.

Even if Majors could establish a *prima facie* case of sex discrimination (and she cannot), she cannot demonstrate that GE's legitimate, non-discriminatory reason for denying her the PMA jobs was pretext for sex discrimination. To show pretext, Majors must demonstrate that GE's explanation for denying her the PMA jobs—her permanent work restrictions—was a lie. *Gates v. Caterpillar, Inc.* 513 F.3d 680, 690 (7th Cir. 2008). Majors offers no evidence—and none exists—that GE denied her the PMA jobs for any reason other than her permanent work restrictions.

Majors admits that she was told she was denied the PMA jobs because of her permanent medical restrictions. (Majors Dep., pp. 113-14, 206; Exs. 12, 14; Karr Dep., pp. 13-14; Kristoff Dep., pp. 26-28) In addition, Majors' medical records plainly state she is precluded from lifting over 20 pounds. (Majors Dep., Exs. 5-7) Majors claims she told Kristoff that her work restrictions no longer applied (Majors Dep., pp. 95-98); however, Majors admitted she did not present any medical evidence to corroborate her claim. (Majors Dep., pp. 104, 107, 279-80) But even if Majors' claim that she did not have the permanent restrictions reflected in her medical records was true, GE's reliance on the medical records – as opposed to Majors' contrary claim – would demonstrate only that GE made a *mistake—not engaged in discrimination*. To demonstrate pretext, Majors "must show more than that the employer's decision was incorrect; [she] must also show the employer lied about its proffered explanation." *Johnson v. Nordstrom, Inc.*, 260 F.3d 727, 732 (7th Cir. 2001). "It is not the court's concern that an employer may be wrong . . . or be too hard on its employee. Rather, the only concern is whether the employer's proffered reason was . . . a lie." *Gates*, 513 F.3d at 691. GE denied Majors the PMA jobs because it honestly believed Majors had permanent restrictions that precluded her from performing the job. Accordingly, GE is entitled to summary judgment on Majors' sex discrimination claim.[3]

[3] Although she alleges sex and disability discrimination, Majors testified that she believes Taylor and Ira received the PMA job because of personal relationships they had with Company and/or Union personnel. Majors claims a "conspiracy was going on because they wanted Barry Taylor in the job" -- because his mother was in Human Resources at GE for a long time and the Safety Committee personnel, including Taylor's wife, wanted him to be the PMA. (Majors Dep., pp. 100, 292-93, 295-97) Similarly, Majors claims that Ira obtained the permanent PMA job because he was "buddy buddy buddy" with Carvin Thomas, the Union President. (Majors Dep., p. 315) GE denies Majors' unsupported speculation, but notes these would be legitimate, non-discriminatory reasons for their selections to the PMA position.

B. GE Is Entitled To Summary Judgment On Majors' Disability Discrimination Claims.

Majors alleges that by denying her the PMA job because of her permanent work restrictions, GE regarded her as disabled in violation of the ADA. (Majors Dep., pp. 300-03) Majors admitted in her deposition that lifting objects weighing in excess of 20 pounds, *i.e.*, compressors, boxes of screws, and other materials, is an essential function of the PMA job. (Majors Dep., pp. 36, 179) Nor does Majors dispute that her medical records say she has permanent work restrictions precluding her from lifting in excess of 20 pounds. Majors also acknowledged that GE should not assign work to an employee that is outside of her work restrictions. (Majors Dep., pp. 198-99) Majors contends, however, that her permanent restrictions no longer apply and that she so advised GE. (Majors Dep., pp. 95-98) But, Majors admitted that she did not provide GE any medical information to contradict or modify the permanent work restrictions contained in Majors' medical file. (Majors Dep., pp. 104, 107, 279-280) Thus, the Court should enter summary judgment in favor of GE.

The ADA prohibits an employer from discriminating against an individual based upon such person's disability. 42 U.S.C. § 12112(a). The ADA defines a disability as: (a) a physical or mental impairment that substantially limits one or more major life activities of the individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment. 42 U.S.C. § 12102(1). Majors disclaims having an actual disability; she contends only that GE regarded her as disabled, which claim is premised upon the Company's reliance on the medical restrictions to deny her the PMA job. (Majors Dep., pp. 300-03)

The statute defines the "regarded as" prong of disability as follows:

> An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or

> mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

Id.

1. *GE did not regard Majors as disabled; rather, it properly adhered to her medical restrictions.*

It is well-settled that an employer's "recognition or implementation of the restrictions imposed" by a doctor is not enough "to establish a regarded as claim." *Rivera v. Pfizer Pharmaceuticals, LLC*, 521 F.3d 76 (1st Cir. 2008); *see also Boldridge v. Tyson Foods, Inc.*, 2008 WL 222026, *3 (10th Cir. May 30, 2008) (affirming summary judgment for Tyson on ADA-perceived disability claim because Tyson's perception of plaintiff's impairment "was not based upon speculation, stereotype, or myth, but upon the…doctor's written restrictions of her physical abilities."); *Staszak v. Kimberly-Clark Corp.*, 2002 WL 1858788, *3 (N.D. Ill. Aug. 12, 2002) (summary judgment for employer on ADA claim; "one of [Staszak's] beefs . . . is . . . that he was not allowed to ignore his doctors' orders and work despite the restrictions . . . . Aside from the fact that we would not endorse such an irresponsible action by Kimberly-Clark, there is nothing in the ADA that requires a company to disregard uncontroverted medical opinions simply because an employee has decided to play the odds that the doctor is wrong"). Accordingly, by adhering to her medical restrictions, GE did not regard Majors as disabled.

In fact, if GE had disregarded Majors' permanent restrictions, it could have faced liability under the ADA. In *Crosby v. UPMC*, 2009 WL 735868 (W.D. Pa. Mar. 20, 2009), the court granted summary judgment for the employer on plaintiff's ADA claim, and declared:

> Plaintiff's verbal assurances that contradicted the physician's order, if such assurances were in fact given, are insufficient to overcome the physician's directive. The interactive process creates an obligation on both parties. (internal citations omitted). If plaintiff believed she was able to do more than what was indicated on the prescription that she provided to her employer, she should have submitted a new or revised prescription. Were defendant to not honor the accommodation called for by the medical information plaintiff provided,

> defendant might open itself up to liability of a different stripe. *See Smith v. Henderson*, 376 F.3d 529, 537-38 (6th Cir. 2004) (forcing an employee to work in excess of medical restrictions would support a violation of the ADA).

Id., 2009 WL 735868, * 14.

Consistent with the concern expressed by the court in *Crosby*, on October 26, 2004, Majors filed an EEOC charge alleging disability discrimination under the ADA because her supervisor at the time, Dave Ripley, "attempted to force [her] into violating [her] work restrictions. For example, . . . Mr. Ripley told me to carry some refrigerator doors. I told him I had a restriction from a workman's comp injury and was not supposed to carry doors." (Majors Dep. Ex. 11)[4] In sharp contrast, Majors now claims that those same permanent work restrictions no longer apply and GE should have disregarded them.[5] Majors admits, however, that she did not obtain a statement from a doctor removing or modifying her permanent work restrictions. (Majors Dep., pp. 104, 107, 279-280) Her failure to do so is fatal to her ADA claims. *Staszak*, 2002 WL1858788, *3; *Crosby*, 2009 WL 735868, *4. The Court should enter summary judgment for GE on Majors' ADA claims.

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[4] Majors filed a grievance over the same incident on May 11, 2004, claiming the "BTL [Dave Ripley] giving work direction that would violate the employee's restrictions." (Majors Dep., Ex. 9) GE denied the grievance, and the Union did not grieve it beyond the second step. (Majors Dep., pp. 79-80) Majors asserts the Union did not appeal even to step three "because half the people in the Union sucked Dave Ripley's butt so they wouldn't have to work or do anything." (Majors Dep., p. 80) As to the underlying event, Dave Ripley arrived at the plant at approximately 9:45 p.m. and, according to Majors, "he finds out the assembly line area was not working, and the maintenance guys was working on it, and he wanted me to go over there and do something that was the maintenance man's job, . . ." (Majors Dep., p. 70) Majors admits that Ripley asked not only her, but also Bob Dayhuff to go help with the doors and that Dayhuff did what he was asked. (Majors Dep., pp. 74-75) Majors, on the other hand, told Ripley "no," she had other work to do. (Majors Dep., pp. 74-75) Majors claims that thereafter Ripley grabbed her elbow (Ripley denied grabbing Majors' elbow). At some point during the conversation, Majors told Ripley she had work restrictions and was going to go to the clinic; Ripley called the clinic and confirmed Majors had work restrictions, so he dropped the matter. (Majors Dep., pp. 81-83)

[5] Recognizing that her 2004 EEOC charge is inconsistent with her present contention that she did not have the work restrictions, Majors denied having read the charge prior to signing it even though the charge states: "I declare under penalty of perjury that the above is true and correct." (Majors Dep., pp. 88-90; Ex. 11)

2. *Because Majors alleges only that GE regarded her as disabled, she was not entitled to a reasonable accommodation under the ADA.*

The 2008 amendments to the ADA clarified that an individual "regarded as" disabled (as opposed to actually disabled) is not entitled to a reasonable accommodation. 42 U.S.C. 12201(h); *Accord Powers v. USF Holland, Inc.*, 2010 WL 1994833 (N.D. Ind. May 13, 2010), *affirmed* 667 F.3d 815 (7th Cir. 2011) ("By excluding the requirement to accommodate individuals who are only regarded as disabled, the ADAAA recognizes the obvious: if an individual is not actually disabled, then he or she does not need the accommodation in the first place. Thus, while an employer may not discriminate against persons it perceives as disabled, the law does not impose a duty upon that employer to accommodate what turns out to be a fictional impairment."). Because GE properly relied on Majors' medical restrictions to deny her the PMA job and Majors was not entitled to a reasonable accommodation, GE is entitled to summary judgment on Majors' ADA claims.

3. *Even if Majors had an actual disability and was entitled to a reasonable accommodation, her claim would fail as a matter of law.*

Even if Majors were claiming that she had an actual disability that GE had a duty to reasonably accommodate, her claim would fail. Majors' only suggested "accommodations"—having someone else perform the lifting for her or disregarding her permanent restrictions—are unreasonable as a matter of law.

An employer does not have to remove an essential job function to accommodate a disabled employee. *Povey v. City of Jeffersonville*, 2011 WL 1085343 (S.D. Ind. March 21, 2011) ("In sum, Plaintiff's 'accommodations' are not accommodations at all; rather, they are requests to eliminate certain essential functions of her job.") (*citing Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 912 (7th Cir. 1996) (holding that plaintiff's request for a "helper" is not a reasonable accommodation because plaintiff would not be performing the essential functions of his position). And, it is undisputed that lifting in excess of 20 pounds is an essential function of the PMA job—Majors admitted this in her deposition, it is identified in the contemporaneous functional job analysis, and the supervisor over the PMAs also testified as much. Accordingly, GE had no obligation to remove the lifting requirements of the PMA job. *See, e.g., Peters v. City of Mauston*, 311 F.3d 835, 845, 846 (7th Cir. 2002) (noting "we do not second-guess the employer's judgment as to the essential functions" and rejecting as "unreasonable" plaintiff's "request that someone else do the heaviest lifting for him if he could not handle it" because that would require another person to perform an essential function); *Povey*, 2011 WL 1085343 *8 (rejecting plaintiff's request for a helper to perform cleaning and lifting that are essential to the job).

Nor, as Majors requests, was GE required to ignore her medical restrictions to allow her to "try and see" if she could perform the PMA job. As the Seventh Circuit stated in affirming summary judgment for the employer in *Peters v. City of Mauston*:

> Second, though the district court did not address this issue, we hold that Peters' proposed "try and see" request is also unreasonable. Allowing the employee to return to work to see if he can complete the job is the wrong test as to whether an accommodation is reasonable. *See Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599, 603 (7th Cir. 1999). The employer is not obligated to allow the employee to try the job out in order to determine whether some yet-to-be requested accommodation may be needed. While the law gives the disabled employee the right to perform the job without a reasonable accommodation, the City determined that Peters could not safely perform the tasks assigned to an Operator because of his permanent, physician-imposed lifting restrictions. Given the permanent nature of those lifting restrictions at that time, we cannot say that Peters would have been able to complete the job without a reasonable accommodation. Absent any other reasonable request for an accommodation, the City need not incur additional liability to "try and see" whether Peters can handle the job despite his permanent lifting restrictions.

Id. at 846.

Likewise, in *Staszak v. Kimberly-Clark Corp.*, 2002 WL 1858788 (N.D. Ill. Aug. 12, 2002), the court granted summary judgment for the employer on the plaintiff's ADA claim, stating in relevant part:

> The demands of [Staszak's] sales position included the ability to work beyond 40 hours per week if necessary, a requirement that his doctors concluded he did not have. Staszak gave Kimberly–Clark no indication that his condition would ever improve. Indeed, one of his beefs against his former employer is not that he eventually was able to work more than 40 hours per week but that he was not allowed to ignore his doctors' orders and work despite the restrictions. Staszak classifies this refusal as a failure to accommodate. Aside from the fact that we would not endorse such an irresponsible action by Kimberly–Clark, there is nothing in the ADA that requires a company to disregard uncontroverted medical opinions simply because an employee has decided to play the odds that the doctor is wrong.

(*Id*., 2002 WL 1858788, *3). *See also Crosby*, 2009 WL 735868, *14 ("Plaintiff's verbal assurances that contradicted the physician's order, if such assurances were in fact given, are insufficient to overcome the physician's directive. The interactive process creates an obligation on both parties. If plaintiff believed she was able to do more than what was indicated on the prescription that she provided to her employer, she should have submitted a new or revised prescription.").

If, as she now claims, Majors does not have the permanent restrictions that are reflected in GE's records, it was incumbent upon Majors to present medical evidence that those restrictions did not apply. She failed to do so and cannot now fault GE for her own failings.[6]

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[6] Majors contends that because she worked as a PMA from December 2000 to June 2001, she could perform the job in 2009. Majors ignores, however, that there were 3,200 employees working at GE at that time and many other employees were available to assist with lifting. As Tony Kristoff testified: "For in the past when she had the position, they had more staffing at the time and that another person could remove them [heavier items from the line] and do part of her job for her." (Kristoff Dep. p. 29) As a result of significant layoffs and the near closing of the plant, the workforce was down to around 800 employees in 2009, and the PMA had to do the lifting as noted in the job description and functional job analysis; there were not other people that could "do part of [the] job for her." (Kristoff Dep. pp. 29-30)

For all of the foregoing reasons, the Court should grant GE summary judgment on Majors' disability discrimination claim.

C. GE Is Entitled To Summary Judgment On Majors' Retaliation Claim.

In her Complaint and her March 30, 2010 EEOC charge, Majors alleges that she filed an EEOC charge in 2005, and thereafter was "continuously denied overtime." (Complaint, ¶¶ 15-16 and Ex. C) Majors also asserts she was denied the opportunity to work on LOW Fridays from October 2008 to November 2009. (Complaint, ¶ 31) Majors' LOW Friday work claim is barred because it is outside the scope of her EEOC charges. In addition, her overtime and LOW Friday work claims are time-barred to the extent based on conduct occurring prior to June 3, 2009—300 days prior to her March 30, 2010 EEOC charge. Majors' retaliation claim also fails on the merits for multiple reasons, including: (1) Majors' supervisors who made the overtime and Friday work decisions were unaware of her charge and, therefore, could not have retaliated against her; (2) Majors cannot show that similarly situated employees who did not file charges were treated better; and (3) Majors cannot prove that GE's legitimate non-retaliatory reasons for its employment decisions constitute pretext.

1. Majors' claim based on the denial of the opportunity to work on Fridays when the plant was off for LOW is barred because it is outside the scope of Majors' EEOC charges.

"[A]llegations that are not included in an EEOC Charge cannot be contained in a subsequent complaint filed in the District Court." *Kirk v. Federal Property Mgmt.*, 22 F.3d 135, 139 (7th Cir. 1994). This rule serves the dual purpose of affording the EEOC and the employer an opportunity to settle the dispute through conference, conciliation, and persuasion, and of giving the employer some warning of the conduct about which the employee is aggrieved. *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1110 (7th Cir. 1992). The rule is a condition precedent with which plaintiffs must comply. *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 863 (7th Cir. 1985).

On May 22, 2009, Majors filed an EEOC charge alleging that she was denied a temporary PMA job on May 7, 2009 because of her disability and sex. The charge made no other claim. On March 30, 2010, Majors filed another EEOC charge, claiming that she had filed a charge in 2005 and thereafter was "continuously denied overtime." Majors did not, however, make any claim over Friday work in her EEOC charges; thus, her allegations of retaliatory denial of Friday work are precluded because they are beyond the scope of her EEOC charges.

2. Majors' claims based on conduct prior to June 3, 2009 are time-barred.

To pursue a claim under Title VII or the ADA, a plaintiff must file a timely charge with the EEOC. 42 U.S.C. § 2000e-(5); 42 U.S.C. § 12117(a). Because Indiana is a "deferral state," Majors had 300 days from the date any alleged adverse employment action occurred to file a charge alleging a Title VII or ADA violation. *Laouini v. CLM Freight Lines, Inc.*, 586 F.3d 473, 475 (7th Cir. 2009). "A claim is time barred if it is not filed within [this] time limit." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002). In *Morgan*, the Supreme Court held that the continuing violation doctrine was not applicable except in cases involving hostile work environment harassment. *Id*. at 115. In other words, where, as here, plaintiff asserts that she was denied opportunities to work overtime or on Fridays—which were discrete decisions known to her at the time they occurred and ostensibly caused her direct economic harm at that time—she had to file a charge within 300 days of each denial of overtime or Friday work. *Id* at 110, 113; *Roney v. Illinois Dep't of Transportation*, 474 F.3d 455, 460 (7th Cir. 2007).

Because Majors did not raise her overtime claim until her March 30, 2010 EEOC charge, she can recover, at most, only overtime she allegedly was denied on or after June 3, 2009 (300 days prior to March 30, 2010). As discussed previously, Majors' Friday work claim is barred because it is outside the scope of her EEOC charges. But even if she had included it in her March 30, 2010 charge, this claim would, like her overtime claim, be limited to retaliatory denial of Fridays on or after June 3, 2009. Nor is there any basis to toll the limitations period. Majors believed she was being wrongly denied overtime long before she filed her March 30, 2010 EEOC charge. In 2007 and 2008, she filed grievances under the CBA claiming she was denied overtime. (Majors Dep., Exs. 29-32) Thus, Majors' overtime and Friday work claims are limited to the five-month period from June 3, 2009 to October 31, 2009 when she retired. *See Roney*, 474 F.3d at 460 (demotion claim untimely despite alleged "continuing nature" where plaintiff knew about demotion, as evidenced by letter he wrote complaining about it).

3. Majors' retaliation claim fails on the merits.

Even if Majors' overtime and Friday work claims were not time-barred and fell within the scope of her EEOC charges, she nonetheless could not establish that she was subjected to unlawful retaliation. First and foremost, Majors' supervisors—the persons who decided whether she worked overtime or on LOW Fridays—were unaware of her EEOC charges. Consequently, they could not have retaliated against her. Even if they had been aware of Majors' charges, she still could not establish a *prima facie* case, because she cannot show that similarly situated persons were treated better. What is more, GE had legitimate, non-retaliatory reasons for its employment decisions and there is no evidence of pretext.

Title VII prohibits employers from retaliating against employees for filing charges alleging violations of Title VII. 42 U.S.C. § 2000e-3(a); *Sitar v. Indiana Dept. of Transp.*, 344

F.3d 720, 728 (7th Cir. 2003).[7] Majors may prove retaliation via the direct or indirect method. *Nichols v. Southern Illinois University – Edwardsville*, 510 F.3d 772, 785 (7th Cir. 2007). The direct method requires Majors to show that: (1) she engaged protected activity; (2) she suffered an adverse employment action by GE; and (3) a causal connection between the two events. *Nichols*, 510 F.3d at 785. Under the indirect method, Majors must demonstrate that: (1) she engaged in a protected activity; (2) she met GE's legitimate expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity. *Nichols*, 510 F.3d at 785.

Upon proving a *prima facie* case under the indirect method, GE can rebut the showing by presenting evidence of "legitimate, noninvidious reasons for its actions." *Atanus v. Perry*, 520 F.3d 662, 672 (7th Cir. 2008); *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640, 644 (7th Cir.), *cert. denied*, 537 U.S. 879 (2002) (a reason can be "good or bad provided only that it is not one that the law forbids"). Once GE articulates legitimate, non-discriminatory reasons for its actions, Majors must prove GE's reasons are pretextual – more bluntly – lies. *Id.*

a. Because the persons who assigned Majors overtime and Friday work had no knowledge of Majors' EEOC charges, Majors' retaliation claim fails as a matter of law.

Under both the direct and indirect schemes of proof, the plaintiff must show that the decision-makers knew of plaintiff's protected activity—for without knowledge of such protected activity there can be no showing of an intent to retaliate. *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 668 (7th Cir. 2006); *Durkin v. City of Chicago*, 341 F.3d 606, 614–15 (7th Cir. 2003). A decision-maker cannot retaliate against the employee if he or she is unaware of the

[7] Count III of Majors' complaint asserts retaliation only under Title VII, and not under the ADA. The standards and elements of proof are, however, the same. Consequently, even if Majors had sought to assert an ADA retaliation claim, it would fail for the same reasons that her Title VII retaliation claim fails.

complaint asserted. *Sitar*, 344 F.3d at 727; *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1008 (7th Cir. 2000).

Majors does not claim that either of her BTLs during the relevant time, Gary Hamilton or Amine Karoud, knew about her EEOC charges, and she does not claim that either of them retaliated against her.[8] Nor did Majors file an EEOC charge or even a grievance over anything Hamilton or Karoud allegedly did. Because Hamilton and Karoud were not aware of Majors' charges at the time they made the overtime and Friday work decisions, they could not have retaliated against Majors for having filed such charges. *See Luckie v. Ameritech Corp.*, 389 F.3d 708, 715 (7th Cir. 2004) ("It is not sufficient that an employer could or even should have known about an employee's complaint; the employer must have had actual knowledge of the complaints for its decisions to be retaliatory"); *see also Huppert v. Potter*, 232 Fed. Appx. 576, 581 (7th Cir. 2007) (summary judgment granted for defendant-employer where the plaintiff provided no evidence that decision-makers were aware of the plaintiff's EEO complaint). Accordingly, Majors' retaliation claim fails as a matter of law.

b. Even if her supervisors were aware of Majors' charges, Majors still could not establish a prima facie case, because Majors cannot identify any similarly situated employee who did not engage in protected activity and was treated more favorably.

Assuming, *arguendo*, Majors could show her supervisors were aware of her EEOC charges, Majors' *prima facie* case would, nevertheless, fail because Majors cannot identify a similarly situated individual who did not engage in protected activity that was treated more favorably.

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[8] The only BTLs Majors claimed retaliated against her were Dave Ripley and Robin Roberts. (Majors Dep., p. 283) Roberts was Majors' BTL from October 2005 until October 2008, and Ripley was the BTL only in 2004 and from October 2008 until January 2009 (Majors Dep., pp. 30-31, 285; Jones Dep. Ex. B, p. 4), well outside the statute of limitations. Moreover, Majors did not file a charge or grievance claiming Roberts discriminated against her (Majors Dep., p. 317); and, she testified Roberts was "bipolar," allowed her to work some overtime, and had difficulties with a lot of employees. (Majors Dep., pp. 229, 324-25)

According to the Seventh Circuit:

> To satisfy the similarly situated prong of the prima face case, an employee must be directly comparable in all material respects. This requires the plaintiff to show not only that the employees reported to the same supervisor, engaged in the same conduct, and had the same qualifications, but also show that there were no differentiating or mitigating circumstances as would distinguish…the employer's treatment of them.

Ineichen v. Ameritech, 410 F.3d 956, 961 (7th Cir. 2005).

Majors has no admissible evidence that any other QCIs worked more overtime or on LOW Fridays than she did; she relies solely on the alleged hearsay reports of her hourly coworkers that they worked certain overtime and Fridays. (Majors Dep., pp. 280-81) Such hearsay is not, of course, admissible. *Davis v. G.N. Mortgage Corp.*, 396 F.3d 869, 874 n.3 (7th Cir. 2005); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). In any event, Majors was the only QCI within her cost center and the only QCI who reported to her supervisors, Hamilton and Karoud. It is undisputed that the supervisor of each cost center determines what overtime is needed and who performs it. (Jones Dep., p. 25) It is also undisputed that under the CBA, overtime is equalized among employees by job classification within the cost center. (Majors Dep. Ex. 8, p. 18; Ex. 31) Because the other QCIs worked in other cost centers under different supervisors, Majors is not similarly situated to any other QCIs.[9] GE said as much in response to the overtime grievances Majors filed under the CBA. (Majors Dep. Exs. 29-32) For instance, GE noted: "Rene [Majors] alleges she never works OT in her Job Code. Compares her OT with QC emp not tied to Main Line – C71, C78 these areas have a lot of

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[9] As noted previously, Majors claims that only supervisors Robin Roberts and Dave Ripley retaliated against her and any such alleged retaliation occurred outside the limitations. Majors further admitted that neither Roberts nor Ripley was the BTL over any of the other QCIs. (Majors Dep., p. 228)

OT. I compared her to other QC on Main Line and she [Majors] is higher." (Majors Dep. Ex. 31) GE denied the grievance, stating: "Ms. Majors has worked overtime within her classification in her areas of responsibility. Ms. Majors is the sole holder of her classification within her areas of responsibility; hence, balancing of overtime hours paid is not an issue." (Majors Dep., Ex. 31) Accordingly, GE is entitled to summary judgment on Majors' retaliation claim. *Rogers v. City of Chicago*, 320 F.3d 748 (7th Cir. 2003) (summary judgment proper when plaintiffs cannot produce competent evidence that they were treated differently than similarly situated employees).

Because Majors cannot establish a *prima facie* case of retaliation, summary judgment must be entered for GE. *See, e.g.*, *Grayson*, 317 F.3d at 748 (plaintiff failed to make out a *prima facie* case of discrimination and, therefore, the court affirmed the district court's grant of summary judgment without reaching the issue of pretext); *Jones v. United Pacific R. Co.*, 302 F.3d 735, 741 (7th Cir. 2002) ("We have often noted that establishing a *prima facie* case—which the plaintiff must do by a preponderance of the evidence—is a condition precedent to the pretext analysis.").

c. GE provided legitimate, non-discriminatory reasons for denying Majors overtime and Friday work, and she has no evidence of pretext.

Even if Majors could establish a prima facie case of retaliation (and she cannot), Majors fails to clear the pretext hurdle. Majors was not asked to work overtime and on LOW Fridays because her supervisors deemed it unnecessary and were trying to control costs. Majors admitted in her deposition that she was so advised. (Majors Dep., pp. 215-16, 229; Exs. 29, 31) Moreover, as GE stated in response to the grievances Majors filed under the CBA, "Management has the sole responsibility to determine if and when overtime is required." "Ms. Majors has worked overtime within her classification in her areas of responsibility. Ms. Majors is the sole holder of her classification within her areas of responsibility; hence, balancing of overtime hours paid is not an issue. There is no violation of the Contract. Remedy is denied." (Majors Dep., Exs. 29, 31) The Union dropped the grievances, recognizing GE's position was correct. Majors offers no evidence—and none exists—that the reasons she was not asked to work overtime or on LOW Fridays constitute pretext for retaliation.

D. GE Is Entitled To Summary Judgment On Majors' Constructive Discharge (Retirement) Claim.

Majors alleges that she "experienced duress from Defendant in deciding to take an early retirement." (Complaint ¶ 33) Majors testified that she retired because (1) her mother-in-law was dying of cancer, (2) she did not receive the PMA job, (3) the Company was thinking of bumping her to the lowest pay grade due to her work restrictions, and (4) she was not getting to work overtime and on LOW Fridays. (Majors Dep., p. 191) For the reasons previously discussed, GE is entitled to summary judgment on Majors' claims regarding overtime, LOW Friday work, and the PMA job. Moreover, Majors admitted no one from GE suggested she was going to be bumped out of her QCI job. (Majors Dep., p. 192) Finally, that Majors' mother-in-law was dying of cancer obviously cannot be attributed to GE. Accordingly, Majors' constructive discharge/retirement claim fails as a matter of law.

To prove a constructive discharge claim, Majors must first show that her working conditions were so intolerable that a reasonable person would have been compelled to resign/retire. *Rabinowitz v. Pena*, 89 F.3d 482, 489 (7th Cir. 1996). As this Court stated in *Weber v. The Western and Southern Life Insurance Company*, 2000 WL 33309378, (S.D. Ind. March 27, 2000) (J. McKinney):

> Intolerability is not established by showing merely that a reasonable person confronted with the same choices as the employee, would have viewed

> resignation as the wisest or best decision, or even that the employee subjectively felt compelled to resign; presumably every resignation occurs because the employee believes it is in his best interest to resign. Rather, '[i]ntolerability is assessed by the objective standard of whether a reasonable person in the employee's position would have felt *compelled* to resign,'—that is whether he would have had no choice but to resign.

Id., 2000 WL 33309378 at *5 (*quoting Connors v. Chrysler Finance Corp.*, 160 F.3d 971, 976 (3rd Cir. 1998)) (emphasis in original). Second, Majors must demonstrate that the conditions were intolerable because of unlawful discrimination. *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 886 (7th Cir. 1998).

1. Majors cannot show that her working conditions were so intolerable that a reasonable person would have been compelled to retire.

In *Henn v. National Geographic Soc.*, 819 F.2d 824 (7th Cir. 1987), *cert. denied* 484 U.S. 964 (1987), the Seventh Circuit considered age discrimination claims by plaintiffs who had chosen early retirement and then claimed constructive discharge. There, the plaintiffs argued that they had been constructively discharged because their employer gave them the "silent treatment" and threatened them with "unpleasant consequences" if they did not improve their job performance. *Id.* at 829. In affirming summary judgment, the Seventh Circuit held that a showing of constructive discharge depends on what the employer communicated to the employee, not the employee's beliefs. *Id*. at 830. "In essence a constructive discharge occurs only if the employee can show that he would have been fired if they turned down an offer of early retirement." *Weber v. The Western and Southern Life Ins. Co.*, 2000 WL 33309378, *5-6 (S.D. Ind. March 27, 2000) (McKinney, J.) (applying *Henn* and holding plaintiff's constructive discharge claim failed because he did not show he would have been fired had he not chosen retirement).

Majors cannot show that she "would have been [demoted, much less] fired if [she] had decided to continue working or even that [GE] was pressuring [her] to take early retirement." *Weber*, 2000 WL 33309378 at * 6. To the contrary, in the 2007-2011 national CBA, GE and the union negotiated a voluntary SERO Window that was available to employees across the United States who had at least 25 years of service and were age 55 or over. As Joe Jones testified, the SERO Window "allow[ed] people to retire early and draw really good benefits." (Jones Dep., p. 43) On August 24, 2009, prior to being denied the permanent PMA job, Majors voluntarily submitted her application for the SERO window, entitling her to an additional $1,056 per month until she reached age 63 (for six years). Majors was neither told that she would have been fired if she decided to decline the SERO, nor did GE exert any pressure in offering the SERO to her. Moreover, if Majors felt her conditions were so intolerable as to force her retirement, why – after she filed for retirement – did she apply for a job in the plant. Further, Majors made over $25.00 per hour as a QCI. The PMA job was, like her QCI job, in the bargaining unit and paid only $1.50 more per hour. (Majors Dep., pp. 342-43; Ex. 46, p. 8) Construing the facts in Majors' favor, there is no evidence that GE forced Majors to retire; rather, she retired of her own volition.

2. Majors Has No Evidence That Her Working Conditions Were Due to Unlawful Discrimination.

Assuming, *arguendo*, Majors could show that her working conditions were so intolerable that a reasonable person would have been compelled to resign (she cannot), Majors still cannot demonstrate that the denial of overtime hours, LOW Friday work, or the PMA jobs were because of unlawful discrimination. As discussed above, Majors was denied overtime hours and Friday work opportunities because her supervisors deemed it unnecessary, and because overtime and Friday work opportunities were limited for Majors' position in her cost center. Further, GE denied Majors the PMA jobs due to her permanent medical restrictions, not because of her sex or because it regarded Majors as disabled. Majors can provide no evidence that would enable a reasonable jury to conclude that GE discriminatorily denied Majors overtime hours, Friday work, or the PMA jobs. Consequently, Majors' constructive discharge claim also fails because she cannot demonstrate that her working conditions were intolerable because of unlawful discrimination.

V. CONCLUSION

Majors' sex and disability discrimination and retaliation claims are wholly without factual or legal merit, and her pursuit of such claims was, and remains, unreasonable. The Court should enter summary judgment in favor of GE, dismiss Majors' claims in their entirety, and grant GE such other relief as is just and proper, including all costs it has incurred defending against this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2012, a copy of the foregoing *Brief in Support of Defendant's Motion for Summary Judgment* was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's CM/ECF system.

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